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ALEXANDER L. STEVAS,

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1983

WILBURN A. HENDERSON,

Petitioner,

VS.

STATE OF ARKANSAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS**

LESENBERRY & CARPENTER
807 West Third Street
Little Rock, Arkansas 72201
(501) 372-4040

By: THOMAS M. CARPENTER
Counsel for Petitioner

QUESTIONS PRESENTED

- I. WHETHER A STATUTORY SCHEME THAT PERMITS UNFETTERED JURY DISCRETION IN DETERMINING IF A CRIMINAL DEFENDANT IS DEATH-ELIGIBLE VIOLATES EIGHTH AND FOURTEENTH AMENDMENT PROTECTIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT SET FORTH IN *FURMAN v. GEORGIA*, 408 U.S. 238 (1972)?
- II. WHETHER A JURY QUALIFIED TO RENDER A DEATH PENALTY DENIES A CRIMINAL DEFENDANT TRIAL BY A JURY COMPOSED OF A CROSS SECTION OF THE COMMUNITY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS?
- III. WHETHER THE FAILURE OF A STATE TO ENFORCE A PROCEDURAL RULE THAT BARS EVIDENCE OF BAD CHARACTER RISES TO A VIOLATION OF FOURTEENTH AMENDMENT GUARANTEE TO DUE PROCESS OF LAW AS SET FORTH IN *HICKS v. OKLAHOMA*, 447 U.S. 343 (1980)?

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Petitioner, Wilburn A. Henderson (hereinafter Henderson), a prisoner facing death by electrocution in the Arkansas electric chair, petitions for a writ of certiorari to review the affirmance of his conviction and sentence by the Supreme Court of Arkansas.

OPINIONS BELOW

This petition is a direct request for review of the affirmance of the trial court judgment and sentence in this case by the Supreme Court of Arkansas. The only opinion of the Supreme Court of Arkansas is reported in *Henderson v. State*, 279 Ark. 414, 625 S.W.2d 533 (1983). A copy of the opinion is included in the appendix.

JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered on June 13, 1983. The original certiorari petition was due on August 12, 1983. However, because of confusion resulting from an order of the Supreme Court of Arkansas, former appellate counsel believed that the certiorari petition was not due until September 12, 1983. A motion for extension of time to file the certiorari petition was obtained by that counsel — Jesse Kearney.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3), with Henderson asserting here, and having asserted below, a deprivation of rights secured by the Constitution of the United States made applicable to the States through the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. . . .

Eighth Amendment, United States Constitution:

. . . nor cruel and unusual punishments inflicted.

Fourteenth Amendment, United States Constitution:

Section 1. . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 404(a)(1)(b), Ark. Stat. Ann. §28-1001 (Repl. 1979):

(a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: (1) Character of the accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same. . . . (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Ark. Stat. Ann. §41-1501(1)(a) (Repl. 1977):

A person commits capital murder if: (a) acting alone or with one or more other persons, he commits or attempts rape, kidnapping, arson, vehicular piracy, robbery, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. . . .

Ark. Stat. Ann. §41-1502(1)(a) (Repl. 1977):

A person commits murder in the first degree if: (a) acting alone or with one or more other persons, he commits or attempts to commit a felony, and in the course of and in the furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. . . .

STATEMENT OF THE CASE

On November 26, 1980, an apparent robbery/murder took place at a used furniture in Fort Smith, Sebastain County, Arkansas. The victim — Willa O'Dean — was found in the store by customers and a mailman at approximately 2:00 p.m. No one was seen leaving the store at the time of the murder and no physical evidence was apparent. The only possible exception is that a folded piece of paper was found on the floor approximately six feet from the body of the victim.

The piece of paper had the floor plan of a cabin and the name of a realtor. By contacting the realtor and the person leasing the cabin, police were able to determine that Wilburn A. Henderson had shown an interest in that cabin a few days before the robbery/murder. Based upon this information, the police began looking for Henderson.

A few weeks later Henderson was located in Houston, Texas. He was taken into custody by Texas authorities and later questioned by Fort Smith detectives working on the case. An exculpatory in-custodial statement was given by Henderson. In the statement he suggested that another person — Ollie Brown — had committed the murder and, that Brown had threatened to kill Henderson if he revealed that fact. (Brown was dismissed as a suspect after he was later questioned).

Henderson contended in pretrial motions that the statement was given because he was afraid of the Houston authorities. They had threatened to shoot him and he was willing to say anything to be taken out of Houston and back to Arkansas. He admitted that the Fort Smith police had not threatened him. Based upon this information the Sebastian

Circuit Court denied the suppression motion and permitted the statement into evidence.

The Court did suppress certain conversations between Henderson and his wife — Selena Henderson — because of the husband/wife privilege. (These statements were reported in the local news media during a first trial and, because jurors — rushing home to see themselves on television — heard this information, a mistrial was declared).

In pretrial motions Henderson challenged the constitutionality of Arkansas capital murder statute when read in conjunction with the statute on murder in the first degree. Henderson contended that since the jury or prosecutor could — exercising total discretion — decide which robbery/murder was capital murder and which murder in the first degree, the statute was invalid. The Arkansas Supreme Court had said that such a statutory scheme was permissible.

Henderson also challenged the manner in which the jury was selected. Henderson asserted that a jury chosen in such a manner to exclude automatically those persons that were opposed to the death penalty — a "death qualified" jury — denied him trial by a fair cross section of the community as guaranteed every other criminal defendant. The motion to not death qualify the jury was denied and Henderson's jury was selected in this manner.

The State's case against Henderson was purely circumstantial. No witness put Henderson at the store at the time of the killing. A gun that had been pawned by him that day had similar class characteristics as the weapon used in the murder. The weapon used in the murder was a common one according to the State ballistics expert. The

fingerprints found in the store and on the piece of paper that made Henderson a suspect in the first place not only did not match Henderson's but, were not even similar.

During the jury trial Henderson took the stand in his own defense. He refuted the inculpatory parts of his statement and asserted that fear of the Houston police led him to make statements that would at least have him brought back to Arkansas. He claimed that the atmosphere at the time he made the statement was oppressive.

Henderson also denied killing the victim in this case or committing the robbery. He admitted that he had been in the store a few days before looking for furniture for a house he was hoping he could rent with his wife — Selena. He stated that he also went to other stores.

Henderson detailed his movements on the murder. His testimony was supported by both witnesses for the State and his defense witnesses.

On cross-examination the prosecution began questioning Henderson's character by pointing out evidence of his prior marriages and, by asking about aliases that he had used in the past. Henderson had never put his good character into evidence. The trial court permitted this questioning and the Supreme Court of Arkansas affirmed despite an evidentiary rule that clearly forbids such evidence. (This evidence was referred to on several occasions during the penalty phase of Henderson's trial).

The jury convicted Henderson of capital murder. After a separate hearing to determine punishment (Ark. Stat. Ann. §§41-1301, et seq (Repl. 1977)), the jury sentenced him to death by electrocution. The jury found two aggravating circumstances: (1) That the capital murder

was committed by someone that had previously committed an offense involving the use or threat of force or serious physical injury to another person; (2) That the capital murder was committed for pecuniary gain.

Despite the fact that evidence was introduced showing that Henderson was not a problem in jail and, in fact, had been very helpful in getting younger offenders to straighten out their lives, the jury found that no mitigating evidence had been introduced. Making the required findings under Arkansas law, the jury sentenced Henderson to death by electrocution.

The case was appealed to the Supreme Court of Arkansas. The Court rejected arguments concerning the statute and the death qualified jury. While never stating that it was not error to permit testimony about Henderson's former wives or aliases, the Court concluded from its review of the record that there was no prejudice in this questioning.

From the rulings on the constitutionality of the Arkansas statute; the use of a "death qualified" jury to determine the issue of guilt; and, the failure of the Supreme Court of Arkansas to enforce a procedural rule, Henderson brings this petition for writ of certiorari and asks that the Court vacate his conviction and sentence.

REASONS FOR GRANTING THE WRIT

- I. A STATUTORY SCHEME THAT PERMITS THE JURY OR PROSECUTOR TO ARBITRARILY SUBJECT A CRIMINAL DEFENDANT TO THE DEATH PENALTY OR TO A SUBSTANTIALLY LESSER PENALTY WITHOUT ANY GUIDANCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS AS HELD IN *FURMAN v. GEORGIA*, 408 U.S. 238 (1972).

This Court held in *Furman v. Georgia*, 408 U.S. 238 (1972) that a death penalty statute could not stand if it failed to adequately channel the sentencing decisions of juries. To pass constitutional muster, the statute must contain adequate safeguards to assure that the persons subjected to the death penalty are sentenced upon the basis of articulable standards. *Gregg v. Georgia*, 428 U.S. 153 (1976). The Court has not retreated from this position. See, *Zant v. Stephens*, — U.S. —, 77 L.Ed. 2d 235 (1983).

Attacks have been made since *Gregg v. Georgia*, *supra*, on individual aggravating circumstances, *Godfrey v. Georgia*, 446 U.S. 420 (1980); and on a sentencing process that denies the opportunity for consideration of mitigating factors, *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). In all of these decisions, the Court has consistently held to the principle that as long as there is an assurance in the statutory scheme that the fact finder will not be arbitrary in making a defendant death-eligible, or in imposing the death penalty, that statutory scheme will be upheld. *Zant v. Stephens*, *supra*.

Arkansas' statutory scheme fails even before the case reaches the penalty phase of a capital case. This Court should review this scheme to assure that a jury's unfetter-

ed discretion will not be permitted prior to the penalty phase of a death case to raise a defendant to that tier in the proceedings that makes him "death eligible". The situation is exacerbated in Arkansas by opinions of the Arkansas Supreme Court that call for such unfettered discretion. *Simpson v. State*, 274 Ark. 188, 623 S.W.2d 200 (1981); *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980).

The vagueness problem arises because of the overlapping nature of the statute defining the felony murder provisions of capital murder, and the statute defining the felony murder provisions of murder in the first degree. Ark. Stat. Ann. §41-1501(1)(a); §1502(1)(a) (Repl. 1977). The capital murder statute defines seven specific felonies that can lead to a conviction of capital murder if a death is caused during the course of one of those felonies. The murder in the first degree statute applies to "any," felony and has been interpreted to mean those included within the capital murder statute. This statute has never received plenary review by this Court.

The initial attack on this statute in Arkansas was in *Cromwell v. State*, *supra*. The case arose out of a charge of capital murder. However, the issue was the same because of the statutory definition of an attempted felony in Arkansas (Ark. Stat. Ann. §41-705 (Repl. 1977)). The statutes were attacked as being void for vagueness in that they permitted enforcement at the selective whim of a prosecutor or trial jury. See, *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Rather than rejecting the proposition that the Arkansas capital murder statutes provide arbitrary discretion on the part of the prosecutor or jury, the Arkansas Supreme Court welcomed this discretion:

The answer to this argument (of discretionary power) is that the possible exercise of such discretionary authority is not fatal to the statutes for even in capital cases, which this one is not, the evil to be guarded against is the capricious selection of a group of offenders . . . The actual wording of the statute may have been chosen to lighten the possible punishment that might be imposed for conduct falling within the strict definition of capital murder — a consequence that might be acceptable both to the prosecution and to the defense. . . . (Explanation added) *Cromwell v. State*, 269 Ark. at 107, 598 S.W.2d at 736.

However, the problem with the overlapping nature of these statutes did not end here.

If the jury could blithely choose between robbery/murder as a death penalty eligible offense — Ark. Stat. Ann. §41-1501(3) (Repl. 1977) — or robbery/murder as an offense punishable by a minimum of ten years imprisonment or a maximum of life imprisonment (with the possibility of parole) — Ark. Stat. Ann. §41-901(1) (Supp. 1982) — then the defendant should have a right to tell the jury that the offenses were the same.

The Supreme Court of Arkansas agreed. In *Simpson v. State*, 274 Ark. 188, 623 S.W.2d 200 (1981), the Court reversed a capital murder conviction because the appellant was not given proper leeway in cross-examination. The Court went on to point out that on retrial the appellant would be entitled to inform the jury that capital murder and first degree murder, under the facts of the case, were composed of exactly the same elements. 274 Ark. at 194, 623 S.W.2d at 204.

However, when a jury told the trial court that it could not determine the difference between capital murder and murder in the first degree because the language was exactly the same, the Arkansas Supreme Court said "there is no impermissible uncertainty in the definition of the offenses." *Coble v. State*, 274 Ark. 134, 624 S.W.2d 421 (1981). The Court also failed to mention in its opinion that the jury literally asked the trial court for the difference between the two statutory provisions. See, Appendix "B".

The Court has stood firm on its position that the statute is clear. *Simpson v. State*, 278 Ark. 334, 645 S.W.2d 699 (1983). As can be seen from reviewing Appendix "B", despite the Court's saying that there is no confusion, the juries are asking for help because of the confusion between the two statutes.

Such a statutory scheme must be declared void-for-vagueness. Otherwise, a jury is permitted unfettered discretion and can sentence a one defendant to death for exactly the same crime that results in a lesser conviction for a co-defendant. Compare, *Anderson v. State*, 278 Ark. 171, 644 S.W.2d 278 (1983); *Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982).

In conclusion, Arkansas has a statutory scheme that does not provide meaningful guidance to the jury in determining if a defendant is death eligible. Henderson objected to this statutory scheme prior to trial and asked that the charge be reduced to the lesser offense of murder in the first degree. The motion was denied by the trial court.

As noted above, the Arkansas Supreme Court refuses to seriously address this issue further. This Court should grant the petition, set this matter for argument, and

declare that a statutory scheme that permits unfettered discretion by the jury in determining that a defendant is death-eligible violates the Eighth and Fourteenth Amendment protections against cruel and unusual punishment.

II. A CRIMINAL DEFENDANT IS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO TRIAL BY A JURY COMPOSED OF A CROSS SECTION OF THE COMMUNITY WHEN THE JURY EXCLUDES FOR CAUSE THOSE PERSONS OPPOSED TO THE DEATH PENALTY.

The defendant in a criminal case has a constitutional right to be tried on the issue of guilt by a jury comprised of a cross section of the community. *Duren v. Missouri*, 439 U.S. 357 (1979). However, under a procedure suggested by this Court in *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (hereafter *Witherspoon*), the jury in a death penalty case excludes an identifiable class of persons for cause on the issue of guilt because they are opposed to the imposition of the death penalty. Prior to trial, Henderson attempted to get the Sebastian Circuit Court to avoid this violation of his Sixth and Fourteenth Amendment rights by stopping death qualification of the jury. The motion was denied and the Arkansas Supreme Court affirmed.

The issue of whether a death qualified jury is prosecution prone or denies the defendant a jury comprised of a fair cross section of the community was suggested in *Witherspoon*. At that time, because of the tentative nature of the data in support of this position the Court was unwilling to impose a *per se* rule against qualifying juries to impose a death penalty. Since that time numerous studies

have been completed that support the idea that a jury chosen in a death penalty case is different in form and substance from those chosen in any other criminal trial. See, e.g., Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California*, 3 Woodrow Wilson J.L. (1981); Haney, *Juries and the Death Penalty: Readdressing the Weatherspoon Question*, 1980 Crime & Delinq. 512 (1980).

Henderson contends that to prevent him from being tried on a capital murder charge with the type of fair cross section jury to which he would be entitled if he were only being tried on the underlying felony of robbery is unconstitutional. More to the point, Henderson asserts that this Court should grant certiorari to consider this important question.

Mr. Justice Douglas foretold this issue in his separate opinion in *Witherspoon* when he pointed out that all defendants were entitled to a cross section jury on the issue of guilt. 391 U.S. at 531. Although he recognized that the conscience of the community (which must be adhered to in determining whether the death penalty is appropriate in a given case) may vary from community to community, the attitudes towards the death penalty really had no bearing on the determination of the defendant's guilt. Hence, to exclude those persons from the jury because of this viewpoint effectively denied Sixth and Fourteenth Amendment protections to the defendant.

Indeed, in Arkansas the problem is ever greater. A defendant in a trial involving a maximum sentence of a term of years is entitled to a new trial if the trial court and prosecutor force a potential juror to state before hearing any evidence that they could impose a lengthy prison

sentence. *Haynes v. State*, 270 Ark. 685, 606 S.W.2d 563 (1980). Or, as the Court stated:

The question in capital cases is whether the juror would vote for death under any circumstances, not whether he considers the penalty excessive for the crime charged in the case before him.

There is usually no similar emotion feeling in regard to imprisonment for a certain number of years. No conscientious juror should be required to say in advance of the trial whether he would consider the maximum penalty to be excessive. 270 Ark. at 691, 606 S.W.2d at 565.

Hence, the capital defendant is denied not only a cross section jury in Arkansas but, is forced to trial with a jury chosen unlike any other trial jury — *i.e.*, by a jury that is asked extensively about the maximum punishment in the case even before it has heard any of the evidence.

This Court has concluded that if a "distinctive," group is shown to be systematically excluded from a potential jury panel then the criminal defendant is denied trial by a fair cross section of the jury. *Duren v. Missouri*, *supra*. It is not easy to determine exactly what comprises a distinctive group and the Court has been reluctant in undertaking such evaluation. But, in the death qualification process the studies show that the group automatically disqualified includes the poor, women, blacks and certain ethnic and religious groups. *Grigsby v. Mabry*, 483 F. Supp. 1372, 1384 (E.D. Ark. 1980), *aff'd as modified*, 637 F.2d 525 (8th Cir. 1980).

If the showing is made that a systematic exclusion has occurred, then the State must justify that process. But,

while there is justification of excluding persons opposed to the death penalty from a penalty phase, there is no jurisdiction to exclude them from the guilt/innocence phase. This point has been tacitly recognized by this Court in *Adams v. Texas*, 448 U.S. 38 (1980).

The question then becomes whether a jury qualified to render a death penalty violates the defendant's Sixth and Fourteenth Amendment rights to fair and impartial jury comprised of a cross section of the community and, if so, whether such a process should be ended. Henderson contends that the answer to this question is clearly yes. See, *Grigsby v. Mabry*, — F. Supp. — (E.D. Ark. August 5, 1983).

The Court should grant certiorari to this matter to consider this question. Upon review, Henderson's conviction and sentence should be vacated and this matter remanded for trial on the issue of guilt by a jury that represents a cross section of the community and, if necessary, a separate jury on the issue of punishment.

III. THE FAILURE OF A STATE JUDICIAL SYSTEM TO ENFORCE EVIDENCE RULES DESIGNED TO PREVENT INADMISSIBLE CHARACTER EVIDENCE BEING PRESENTED TO THE JURY VIOLATES A CRIMINAL DEFENDANT'S FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW AS STATED IN *HICKS v. OKLAHOMA*, 447 U.S. 343 (1980).

The question is whether the failure of a state trial court — and later a state appellate court — to prevent the

State from using irrelevant, collateral, prejudicial evidence can rise to a federal constitutional right to Due Process of Law under the Fourteenth Amendment. The Court has ruled that the failure to follow a state procedural statute can constitute such a Due Process violation. *Hicks v. Oklahoma*, 447 U.S. 343 (1980). Henderson contends that under the facts of this case such a violation should be declared and this matter reversed and remanded for a new trial.

At issue is whether the prosecution should have been allowed to cross-examine Henderson about former wives that he had, former names that he had used, and a former occupation he had had as a minister. The questioning occurred specifically during the guilt phase of the trial over the objections of the defendant. It continued during the penalty phase of the trial as the State relied upon this inadmissible testimony in cross-examining Henderson's mitigation phase witnesses.

The Arkansas Supreme Court did not rule whether the questioning was proper. This issue was never addressed. The Court did rule, however, that the effect of this questioning was not prejudicial. In light of the fact that a specific rule of evidence precludes such testimony in Arkansas trials — Rule 404, Ark. Stat. Ann. §28-1001 (Repl. 1979) — the matter was prejudicial unless it could be held harmless beyond a reasonable doubt. See, *Chapman v. California*, 386 U.S. 18 (1967).

This Court has recognized that such evidence is inadmissible in a criminal case and can lead to reversal of a conviction. *Michelson v. United States*, 335 U.S. 469 (1958). Only when the defendant directly places his character in evidence can that character be attacked by specific instances of prior conduct. Rule 404, Ark. Stat. Ann.

§28-1001 (Repl. 1979). Henderson never placed his character in evidence in this case.

Henderson recognizes that this Court has scarce resources for the resolution of the many cases presented to it each year. *See, Michigan v. Long*, — U.S. —, 77 L.Ed. 2d 1201 (1983) (Stevens, J., dissenting). But, where a state procedural rule exists and is not followed to the detriment of a criminal defendant then, a federal constitutional right to Due Process of Law has been denied. At that point the issue becomes whether a federal question exists that can be addressed by this Court. *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

In *Hicks, supra*, the direct question was whether a procedural statute that dealt with the degree of punishment a criminal defendant received could be raised to a federal Due Process question when the State failed to follow that statute. This Court said that it could be deemed such a violation because the defendant had a substantial expectation that he would be deprived of liberty only to the extent that a jury should impose penalty.

The question directly presented here is whether that ruling can extend further to evidentiary rules when the state courts fail to enforce those rules, or to provide relief upon the violation of those rules. The substantial question for the criminal defendant in such a case is whether he received a fair trial as guaranteed by the Sixth and Fourteenth Amendments. This case provides a clear example.

On the issue of whether he killed the victim in this case there was absolutely no reason to go years back into the defendant's past to find a time that he used a different name. Henderson attempted to have this procedure stopped before it was started but, the trial court would not sustain

his objection. The Arkansas Supreme Court merely stated that the material was not prejudicial. Yet, from the state of this record that assertion cannot be made beyond a reasonable doubt.

This Court should grant certiorari on the issue of whether such a claim can rise to federal constitutional proportions when the state courts fail to enforce a properly legislated rule of evidence. If so, then the Court should address whether that rule was enforced properly in this case or, at the least, vacate and certify the question to the Supreme Court of Arkansas to determine if the error were truly harmless beyond a reasonable doubt as that standard is defined in *Chapman v. California, supra*. If the error cannot be declared harmless beyond a reasonable doubt, the case should be reversed and remanded for a new trial.

CONCLUSION

Henderson was sentenced to death under a statutory scheme that unconstitutionally permits the prosecutor or jury unfettered discretion in determining if a particular defendant is to be declared death-eligible. Further, Henderson was not tried on the issue of guilt by a jury that represents a fair cross section of the community. Finally, the Court should reaffirm that when a state judicial system fails to give relief according to its statutes this failing by the State constitutes a federal due process violation and that this principle can be applied to state evidentiary rulings when they result in the defendant being denied a fair trial.

For the foregoing reasons, this petition for certiorari should be granted; the matter should be set for briefing and

arguments; and, the conviction and sentence set aside and the matter remanded to the Arkansas courts for retrial.

Respectfully submitted,

LESSENBERRY & CARPENTER
807 West Third Street
Little Rock, Arkansas 72201
(501) 372-4040

By: THOMAS M. CARPENTER
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Thomas M. Carpenter, counsel for petitioner herein, do hereby certify that a sufficient number of true and correct copies of the foregoing petition and accompanying appendix have been served on opposing counsel this 12th day of September, 1983, by mailing said copies, first class postage prepaid, to the Honorable J. Steven Clark, Office of the Attorney General, Justice Building, Little Rock, Arkansas, 72201.

/s/ Thomas M. Carpenter

Appendix

APPENDIX "A"

WILBURN ANTHONY HENDERSON
vs. No. CR 82-107
STATE OF ARKANSAS

Supreme Court of Arkansas
Opinion delivered June 13, 1983

RICHARD B. ADKISSON, Chief Justice. A jury convicted appellant, Wilburn Anthony Henderson, of capital felony murder, and he was sentenced to death by electrocution. On appeal from that conviction we affirm.

The victim was murdered at approximately 2:00 p.m. on November 26, 1980, while she was working in her family owned furniture store in Fort Smith, Arkansas. The autopsy revealed that she was shot once in the head with a .22 caliber pistol and died instantly. The police arrived at the crime scene at about 2:15 p.m. and found the victim lying face down behind the counter. The cash register was open, and at least \$41 was missing.

During the police investigation of the crime scene, one of the detectives found a piece of paper on the floor about six feet from the victim's body. The victim's daughter testified that it had not been there when she was in the store at 1:40 p.m. that afternoon. It was this piece of paper which led to the development of appellant as a suspect in the case. On the paper was a drawing of a floor plan, two phone numbers, an address, and the name of a real estate agent. When contacted by the police, the agent recognized the drawing as the floor plan of a cabin he was trying to rent. It was then discovered that appellant had looked at the

cabin, and had had an appointment with the agent to talk about renting it at 4:30 p.m. the day of the crime; appellant failed to keep this appointment. Appellant was eventually traced to Houston, Texas, where he was picked up by the Houston police. Appellant gave a statement in Houston to the Fort Smith police in which he admitted that he was in the store at the time of the murder, but stated that an acquaintance killed the victim. The acquaintance was questioned, released, and later testified at trial.

There was additional evidence linking appellant to the crime. The investigation revealed that appellant had redeemed a pawned .22 caliber pistol on November 24 but had pawned the pistol again on November 29. A female acquaintance of appellant testified that appellant acted peculiarly when a television report gave a description of the subject sought in the murder. She also testified that appellant told her that the Fort Smith police were looking for him regarding a murder and that if the police asked about him, to tell them he had telephoned from Kansas City. In addition, she was to tell anyone that asked that he still had his moustache, even though he had shaved it off. It was also established that when appellant left for Houston, he abandoned the van he was driving on the day of the murder.

After viewing the evidence in the light most favorable to the State, we conclude that there was substantial evidence to support the jury's finding of guilt.

Appellant argues that our capital murder statute is unconstitutionally vague. We reject this argument. We have upheld the constitutionality of this statute on numerous occasions. In this regard, see *Simpson v. State*, 278 Ark. 334, — S.W.2d — (1983); *Ford v. State*, 276 Ark. 98, 633

S.W.2d 3 (1982); *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981).

Appellant alleges that the capital murder sentencing statutes are unconstitutionally vague for three reasons: First because the aggravating circumstances of Ark. Stat. Ann. §41-1303 (Repl. 1977) are too closely related to the elements of capital felony murder as set out in Ark. Stat. Ann. §41-150 (Repl. 1977); this contention was answered in *Wilson v. State*, 271 Ark. 682, 611 S.W.2d 739 (1981) where we held that the aggravating circumstances are not an element of capital murder. Secondly, appellant points to the fact that there is no specific definition of "mitigating circumstances" in Ark. Stat. Ann. §41-1304 (Repl. 1977); however, we have held that the fact that the jury is not limited to specifically enumerated mitigating factors accrues to the benefit of the defendant, because it gives the jury a greater opportunity to extend leniency to him. *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980). Thirdly, appellant argues that our sentencing statutes are unconstitutional because there is no accurate comparison of death penalty cases, since not all such cases are appealed and those that are do not always contain complete records; in answering this contention we note that it is highly unlikely that any death case will not be appealed; the constitutionality of our appellate process in death penalty cases was upheld in *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977); appellant's allegation that the records in death cases are inadequate has no merit.

Appellant argues that the trial court erred in excusing for cause a juror who stated that she could not under any circumstances impose the death penalty, thereby allowing a "death qualified" jury to determine his guilt or innocence.

More specifically, appellant argues that since Ark. Stat. Ann. §41-1302 (Repl. 1977) does not require that a jury be composed only of members who can recommend the death penalty, persons who cannot impose the death penalty should be allowed to sit on the jury. However, the statute contemplates that persons on the jury will be capable of imposing the death penalty. It is not error for the court to strike for cause persons who cannot carry out the law. See *Haynes v. State*, 270 Ark. 685, 606 S.W.2d 563 (1980). Appellant's contention that a death qualified jury is more conviction prone was rejected in *Lasley v. State*, 274 Ark. 352, 625 S.W.2d 466 (1981), and appellant's argument concerning a bifurcated trial, with one jury for determining guilt or innocence and another one for sentencing, was rejected in *Hill v. State*, 275 Ark. 71, 628 S.W.2d 285 (1982).

Appellant also alleges that the trial court erred in not granting his motion for expert witnesses to testify at a hearing on the issue of a death qualified jury. The court satisfied appellant's request by allowing appellant to introduce several documentary studies on this issue:

The Court: We will resume the hearing on Wilburn Anthony Henderson. On Defendant's Motion for Witness Fee, Expert Witness Concerning Exclusion of Veniremen, defendant was allowed to introduce several studies or papers. Does that satisfy your request for a witness in this matter, Mr. Settle?

Mr. Settle: [Defense attorney]

The court has accepted these documents into evidence?

The Court: Yes.

Mr. Settle: And accepted it as evidence to the other motions I filed?

The Court: Yes, sir.

Mr. Settle: All right, sir.

The Court: That motion will be satisfied.

Appellant made no objection to this ruling, and under these circumstances, this point has not been properly preserved for appeal.

Appellant argues that the trial court erred in refusing to suppress the statement he gave to a Fort Smith detective while incarcerated in Houston. This argument is without merit. Although an in-custody statement is presumed to be involuntary, in this case the State has met its burden of proving that appellant's statement was made voluntarily, without hope of reward or fear of punishment. *Watson v. State*, 255 Ark. 631, 501 S.W.2d 609 (1973). At the pretrial hearing to determine voluntariness, a verbatim transcript of appellant's recorded statement was introduced into evidence. The transcript reflects that appellant was asked if he was treated fairly, to which he responded, "Yes, sir," and that he was given an opportunity to say anything he desired concerning the voluntariness of his statement at the end of the interview. He responded that he had nothing more to say. The detective who took the statement testified that he advised appellant of his *Miranda* rights, that appellant agreed to make a statement, and that no promises, threats, or coercion were used to obtain the statement. At trial appellant testified that the statement was involuntary because he was frightened since the Houston police officer, who took him in, told him if he attempted to escape he would "blow him away." However, that officer did not question him and was not present when he gave his statement. Appellant admitted that the interrogating officers did not abuse him in any way. Therefore, even in light of

appellant's testimony at trial, the trial court's finding of voluntariness will not be disturbed on appeal.

Appellant next argues that the trial court erred in admitting a photograph of the victim taken in the autopsy room. The photograph depicted the area of the wound and it enabled the jury to better understand the testimony of the state medical examiner. The admissibility of photographs is within the sound discretion of the trial court, and will not be set aside absent a manifest abuse of discretion. *Roleson v. State*, 277 Ark. 148, 640 S.W.2d 113 (1982). Here, we cannot say that there was an abuse of discretion. Appellant argues that the admission in evidence of the autopsy report was error; the admission in evidence of an autopsy report is permitted by Ark. Stat. Ann. §42-1220 (Supp. 1981).

Appellant also alleges that prejudicial error occurred when he had to object to certain photographs proffered by the State. We cannot agree. The discussions concerning the photographs occurred at the bench. We find no prejudicial error in this regard.

Appellant contends that the trial court erred in refusing to sequester the jury during his trial. To support this argument, appellant points to the fact that his first trial ended in a mistrial because of publicity and the fact that there was television and newspaper coverage surrounding his second trial. The decision of whether or not to sequester the jury is left to the discretion of the trial court. Ark. Stat. Ann. §43-2121 (Repl. 1977). The trial court's decision will not be disturbed in the absence of a clear showing of prejudice. *Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982). Here, appellant has failed to demonstrate the necessary showing of prejudice. Each juror was thoroughly questioned about media influence, and each one selected was

admonished to refrain from discussing the case, reading about it in the newspaper, or listening to radio or television reports. Appellant is not entitled to a jury completely ignorant of the crime. *Anderson v. State*, 278 Ark. 171, — S.W.2d — (1983). It is sufficient if the juror can lay aside his opinions and render a verdict based on the evidence presented in court. *Kellensworth v. State*, 276 Ark. 127, 633 S.W.2d 21 (1982).

Appellant argues that the trial court erred in instructing the jury as to the lesser included offense of second degree murder, AMCI 1503. He cites *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980) for the proposition that the State must choose either the capital murder instruction or the second degree instruction, but not both. Such reliance is misplaced. This court has held that the jury should have the opportunity to consider lesser included offenses where the evidence warrants, even if the defendant objects. *Caton and Headley v. State*, 252 Ark. 420, 479 S.W.2d 537 (1972). In any event, appellant was clearly not prejudiced by the submission of the second degree murder instruction since the jury convicted him of the greater offense of capital felony murder.

Appellant also alleges that it was error to give AMCI 1501-A, the Capital Murder — Associated Felony instruction, because it was cumulative of AMCI 1501, the Capital Murder instruction. This argument is without merit. The "note on use" following 1501-A explains:

A charge of capital murder committed in the course of one of the felonies specified in Ark. Stat. Ann. §41-1501(a) (Repl. 1977) will require proof of that felony. This instruction is designed for use in defining

the felony if requested by either party or if the court feels it would be helpful to the jury.

Here, appellant was charged with murder committed during the course of a robbery; therefore, it was not error for AMCI 1501-A defining robbery to be given.

Appellant argues that the trial court erred in allowing the State to ask appellant certain allegedly irrelevant and prejudicial questions concerning a previous marriage and other names he had used in the past. Appellant alleges that he was prejudiced by the State inquiring into these "morally stigmatizing subjects," but we cannot say from an examination of the record that these questions, standing alone, constituted prejudicial error.

We find no evidence that the jury's verdict was based on either passion or prejudice, nor do we find the imposition of the death penalty in this case to be arbitrary, capricious, or wanton. In our comparative review of death sentences, we find the sentence not excessive. See *Sumlin v. State*, 273 Ark. 185, 617 S.W.2d 372 (1981).

In the sentencing phase of the trial the jury received as evidence of aggravating circumstances four prior felony convictions in California for the felony crimes of rape, assault with a deadly weapon, assault by means of force likely to produce great bodily injury, and robbery. This evidence supported the jury's finding that appellant had previously committed another felony, an element of which was the use of threat of violence to another person. The jury found no mitigating circumstances. The jury's finding that the aggravating circumstances outweighed, beyond a reasonable doubt, any mitigating circumstances is supported by the evidence.

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We have examined all objections pursuant to Rule 11 (f), Rules of the Supreme Court, Ark. Stat. Ann., Vol. 3A (Repl. 1977) and find no error. See *Earl v. State*, *supra*.

Affirmed.

APPENDIX "B"

STATE OF ARKANSAS

vs. No. CR 80-13

ALLEN COBLE

Craighead Circuit Court

TRANSCRIPT

(REPORTER'S NOTE: At approximately 1:15 p.m. the jury returned to Open Court; proceedings were as follows):

THE COURT: Do you have a question?

JUROR: Your Honor, we are having some difficulty over procedural matters and we would like — if any of the jury members would like to do so, I would like for them to frame their questions to you rather than me trying to tell you what they are curious about (R. 729) and if you will reinstruct us.

THE COURT: I will say this: At this stage of the trial, I am, under our procedures, rather limited in what I can tell you. If the question is one I feel I can properly answer, and I know the answer, I will do so. If the question is one that I feel that I cannot properly answer, I will have to tell you that. I am sure there may be many unanswered questions which you may have to answer, but we can't supplement the testimony. If it pertains to something you were wondering why wasn't proved, it is too late for that and you will have to do the best you can with what was presented.

JUROR: Your Honor, I think one of the two problems we have, some of us say one thing and some say another as

to what we were charged to do with the four sheets of paper.

THE COURT: First of all, you select a foreman, and then you take up and consider the charge of a capital murder. If your answer to that is guilty, you are finished and you come back in here. If your answer is not guilty, you then proceed to the first degree.

JUROR: Could you or the defense or the prosecuting attorney decipher between capital murder and first degree murder? (R. 730)

THE COURT: You have been instructed on that and it would not be proper for any of us to supplement that.

JUROR: Thank you. (R. 731)

(REPORTER'S NOTE: Thereupon, the jury returned to the jury room to deliberate their verdict. Proceedings were in Open Court as follows:) . . .

APPENDIX "C"

STATE OF ARKANSAS

vs. No. CR 81-46

WILBURN A. HENDERSON

Sebastian Circuit Court

TRANSCRIPT

MR. FIELDS: And when had you been divorced from your previous wife, the one you lived with here in Fort Smith?

W.A. HENDERSON: In June of the same year.

Q. Okay, and is that Elizabeth we're talking about?

A. Yes, sir. It wasn't recognized because it was a Mexican divorce.

Q. Okay, so, now when did you divorce her?

A. I divorced her in June through Mexican divorce.

Q. June what of 1980?

A. June 1st is when I got notification.

Q. Well, could it have been June 19th, 1981?

A. I'd have to look at my legal file, but I'm sure of that.

Q. Do you think you could recognize your signature?

A. Possibility. (R. 1509)

Q. Do you recognize that?

A. Yes, sir, I do.

Q. Okay, and that's June 19, 1981, isn't it?

A. This is an Annulment Agreement.

MR. SETTLE: Your Honor, could we approach the bench, please?

(The following discussion is at side bar, outside the hearing of the jury):

MR. SETTLE: Your Honor, I don't believe Mr. Fields — I've given him a considerable amount of leeway. I don't really see the relevance here of questioning the defendant about —

MR. FIELDS: Your Honor, he testified he was with his wife on November 26th, 1980; Elizabeth Henderson was his wife on that date.

MR. SETTLE: That's not correct, Your Honor.

MR. FIELDS: No, sir. Your Honor — Okay, he had married Elizabeth Henderson and there is a divorce here saying that he performed marriage ceremony with Elizabeth on May 4, 1979, and we are going to submit he might have been referring to the fact, you know, just by saying wife, he may have been referring (R. 1510) to Elizabeth Henderson, and that would put him in Fort Smith when he says he wasn't.

MR. SETTLE: No, Your Honor, it is clear that the State is trying to prejudice the defendant. The defendant has clearly stated he was with Selena and was living in Springdale and as we went over this before, the defendant was not married to Elizabeth on that date. He was married to Selena. We went into this before and I think the State is trying to go through the back door to prejudice the defendant.

MR. FIELDS: Your Honor, I'm also going to point out that he said he was having problems with Selena, and I think that problem was the fact that she found out about this earlier marriage to Elizabeth Henderson.

MR. SETTLE: I don't think that was the problem, Your Honor. I don't think that was the cause of the problem.

MR. FIELDS: She can testify to that and I've talked with her and that's what her testimony will be, and I'm going to ask him about that, since he has referred to the problems.

THE COURT: I will overrule the objection. (R. 1511)

MR. SETTLE: Note my exception.

(Discussion at side bar is concluded)

MR. FIELDS CONTINUES:

Q. Who is The Reverend W. A. Henderson?

A. Myself.

Q. Okay, are you a reverend?

A. Yes, I am.

Q. And who is Anthony Santana?

A. At one time —

MR. SETTLE: Your Honor, I object to this. I don't know what the relevance is and would like to approach the bench.

MR. FIELDS: Your Honor, we could tell him.

MR. SETTLE: Your Honor, can we approach the bench? I'd like to know the relevance.

(The following discussion is at side bar, outside the hearing of the jury):

MR. SETTLE: What does Mr. Fields think he's trying to do? I mean this isn't cross-examination. He's making a circus out of this thing.

THE COURT: Who is this last fellow?

MR. FIELDS: It's him.

MR. SETTLE: No, it isn't. (R. 1512)

MR. FIELDS: It's a name he has gone by. He said under oath that his name was W. A. Henderson. He's going to say that. If he doesn't we can prove it.

MR. SETTLE: That I'd like to see. How can you prove it?

MR. FIELDS: It's a name he has gone under. If he says "No," we can prove it. We've got the documents.

THE COURT: I think he'd be entitled to ask it.

MR. FIELDS: Thank you.

MR. SETTLE: Note my exception. (R. 1513)

(Discussion at side bar is concluded)

OCT 25 1983

ALEXANDER L. STEVENS,
CLERK

NO. 83-438

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1983

WILBURN A. HENDERSON,

Petitioner,

VS.

STATE OF ARKANSAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

SUPPLEMENTAL JURISDICTIONAL STATEMENT

LESSENBERRY & CARPENTER
807 West Third Street
Little Rock, Arkansas 72201
(501) 372-4040

By: THOMAS M. CARPENTER

Counsel for Petitioner

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IN THE
Supreme Court Of The United States
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WILBURN A. HENDERSON,

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STATE OF ARKANSAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

SUPPLEMENTAL JURISDICTIONAL STATEMENT

Petitioner, Wilburn A. Henderson [hereafter Henderson], submits this supplemental jurisdictional statement pursuant to Rule 22.6, Rules of the Supreme Court.

Henderson filed a certiorari petition with this Court on September 12, 1983. In the jurisdictional statement Henderson noted that the petition was timely because an extension of time had been obtained by prior counsel. Henderson has since learned that prior counsel did not obtain an extension of time as contemplated by this Court's rules. Henderson's present counsel submits that notwithstanding the apparent untimeliness of this petition, the Court can consider it since this is a criminal case and the rules for filing certiorari petitions in criminal cases are not mandatory. *Taglianetti v. United States*, 394 U.S. 316 (1969).

Henderson's present counsel was asked to prepare the certiorari petition on or about August 12, 1983. Counsel informed Henderson that he could not complete the certiorari petition unless an extension of time was obtained from the Court. Counsel informed Henderson's prior counsel of the steps to use in obtaining an extension of time.

The confusion on the due date for the certiorari petition was based upon two factors: (1) The Supreme Court of Arkansas had provided an order granting Henderson 90 days to file the certiorari petition; (2) Henderson's prior counsel, unfamiliar with the Rules of this Court, assumed that he was allowed 90 days for this petition as opposed to 60.

Former counsel called the Clerk's office to gain an extension of time. Upon consultation with one of the clerks he concluded that an appeal could be filed within 90 days, that that appeal would be treated as a certiorari petition, so no additional motion would be necessary. Former counsel then called present counsel's office and left word that he had made arrangements with the Clerk for the petition to be filed on September 12, 1983.

Present counsel has handled matters before this Court before and knows the procedure to obtain enlarged time for filing the certiorari petition. If present counsel had known the actual circumstances concerning the extension of time prior to the filing of the petition, counsel would have set this fact out in the Jurisdictional Statement.

This Court has jurisdiction pursuant to 28 U.S.C. §1257. The Court should exercise its discretion and act on this certiorari petition in this criminal case. *Heflin v. United States*, 358 U.S. 418, n.7 (1959).

Respectfully submitted,

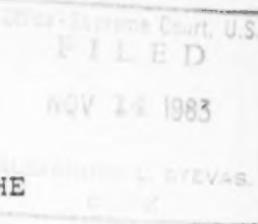
LESSENBERRY & CARPENTER
807 West Third Street
Little Rock, Arkansas 72201
(501) 372-4040

By: THOMAS M. CARPENTER
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Thomas M. Carpenter, present counsel for petitioner [Henderson] herein, and a member of the Bar of this Court, do hereby certify that a correct number of copies of the foregoing supplemental petition have been served on opposing counsel this 18th day of October, 1983, by mailing same, first class postage prepaid, to the Honorable J. Steven Clark, Office of the Attorney General, Justice Building, Little Rock, Arkansas 72201.

/s/ Thomas M. Carpenter
Counsel for Petitioner



NO. 83-438

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1983

WILBURN A. HENDERSON PETITIONER
VS.
STATE OF ARKANSAS RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT
IN OPPOSITION TO PETITION

STEVE CLARK
Attorney General

By: LESLIE M. POWELL
MARCIA TALBOT
Assistant Attorneys General
Justice Building
Little Rock, Arkansas 72201
(501) 321-2007

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I.

WHETHER ARK. STAT. ANN. SECTION 41-1501, ARKANSAS' CAPITAL MURDER STATUTE, BY OVERLAPPING WITH ARK. STAT. ANN. SECTION 41-1502, THE FIRST DEGREE MURDER STATUTE, VIOLATES EIGHTH AND FOURTEENTH AMENDMENT PROTECTIONS AS SET FORTH IN FURMAN V. GEORGIA, 408 U.S. 238 (1972)?

II.

WHETHER PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A JURY COMPOSED OF A CROSS SECTION OF THE COMMUNITY WHEN NO JURORS WERE EXCUSED FOR CAUSE BASED UPON THEIR VIEWS ON THE DEATH PENALTY?

III.

WHETHER AN ALLEGED VIOLATION OF RULE 404, UNIFORM RULES OF EVIDENCE, ARK. STAT. ANN. VOL. 3A (REPL. 1979) ARISES TO A VIOLATION OF DUE PROCESS OF LAW?

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III. THERE WAS NO VIOLATION OF
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OPINIONS BELOW

The opinion of the Arkansas Supreme Court affirming petitioner's conviction and death sentence is reported at Henderson v. State, 279 Ark. 414, 625 S.W.2d 533 (1983). A copy of this opinion is included in petitioner's appendix.

JURISDICTIONAL STATEMENT

Respondent agrees that this Court has discretionary jurisdiction to review this case.

CONSTITUTIONAL PROVISIONS
AND STATUTES

The applicable constitutional provisions and statutes are found in petitioner's brief at pages 2-3.

STATEMENT OF THE CASE

On February 9, 1981, petitioner was charged by information with the capital murder of Willa O'Neal. The events which lead to this charge are outlined as follows:

At approximately 2:00 p.m. on November 26, 1980, Willa O'Neal was robbed and murdered while working in her family owned furniture store in Fort Smith, Arkansas.

The autopsy revealed that she had been shot once in the head with a .22 caliber pistol and died instantly. The police arrived at the crime scene at about 2:15 p.m. and found the victim lying face down behind the counter. The cash register was open, and at least \$41 was missing.

One of the police detectives who investigated the murder found a piece of paper on the floor, about six feet from the victim's body. The victim's daughter testified that it had not been there when

she was in the store at 1:40 p.m. that afternoon. It was this piece of paper which lead to the development of appellant as a suspect in this case. The paper contained a drawing of a floor plan, 2 phone numbers, an address, and the name of a real estate agent. The police contacted the real estate agent, who recognized the floor plan as that of a cabin he was trying to rent. Further investigation revealed that appellant had looked at the cabin and had had an appointment with the agent to talk about renting it at 4:30 p.m. on the day of the crime. Appellant failed to keep the appointment. He was eventually traced to Houston, where he gave a statement to the Fort Smith police admitting he was in the store at the time of the murder, but stating that an acquaintance killed the victim. The acquaintance was questioned, released and later testified at trial.

Further incriminating evidence which was introduced at trial included the fact that appellant had redeemed a pawned .22 caliber pistol on November 24 but had pawned the pistol on November 29, and the fact that when appellant left for Houston, he abandoned the van he was driving on the day of the murder. A female acquaintance testified that appellant acted peculiarly when a television report gave a description of the subject sought in the murder. She also testified that appellant told her the Fort Smith police were looking for him regarding a murder and to tell the police, if they asked, that he had telephoned from Kansas City. In addition, she was to say that he still had his moustache, even though he had shaved it off.

The jury convicted petitioner of capital murder, and he was sentenced to death by electrocution pursuant to Ark. Stat. Ann.

§41-803 (Repl. 1977). The jury found two aggravating circumstances: (1) That the capital murder was committed by someone that had previously committed an offense involving the use of or threat of force or serious physical injury to another person; and (2) that the capital murder was committed for pecuniary gain.

On appeal, the Arkansas Supreme Court affirmed petitioner's conviction and sentence in a 7-0 decision. Petitioner now brings this petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

THE OVERLAPPING LANGUAGE OF ARKANSAS' CAPITAL AND FIRST DEGREE MURDER STATUTES DID NOT RENDER PETITIONER'S CONVICTIONS UNCONSTITUTIONAL.

Petitioner alleges that the overlapping of Arkansas' capital and first degree murder statutes renders the Arkansas statutory scheme unconstitutional, contending that juries have no "meaningful guidance" in determining if the defendant is death eligible. This issue has been considered on numerous occasions by the Arkansas Supreme Court and has been consistently rejected. See, Collins v. State, 259 Ark. 8, 531 S.W.2d 13 (1975); vacated in part, 429 U.S. 808 (1976), aff'd on remand, 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U.S. 878 (1977); Ruiz and Denton v. State, 273 Ark. 94, 617 S.W.2d 6, cert. denied,

454 U.S. 1093 (1981). See also Collins v. Lockhart, 545 F.Supp. 83 (E.D. Ark. 1982).

The Arkansas Supreme Court stated in Collins v. State, supra:

We find that the Arkansas system of prosecuting and sentencing those found guilty of a charge of capital felony murder provides adequate safeguards against arbitrary, capricious or freakish imposition of the death penalty to successfully pass constitutional examination in the light of the Eighth and Fourteenth Amendment standards ascertainable from the Woodson-Roberts-Gregg-Proffit-Jurek quintuplet offspring of Furman.

In Cromwell v. State, 269 Ark. 104, 598 S.W.2d 733 (1980), the Arkansas Supreme Court held that there was no constitutional infirmities in either the overlapping of the capital murder and first degree murder statutes or in the reasonable exercise of discretion by a prosecuting attorney in determining which crime to charge.

The United States Supreme Court has reached an almost identical issue in United States v. Batchelder, 442 U.S. 114 (1979), in which the defendant alleged prejudice because he was convicted under one of two federal gun control statutes which were worded identically but provided different punishments. The Court held such provisions are not void for vagueness and did not constitute due process or equal protection violations.

The provisions in issue here, however, unambiguously specify the activity proscribed and the penalties available upon conviction.... That this particular conduct may violate both titles does not detract from the notice afforded each. Although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments. So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied. 442 U.S. at 123.

The Court further approved the fact that prosecutorial discretion is involved in selecting which crime is charged. Id. at 124.

Juries are customarily given some discretion in sentencing. In capital cases the jury's discretion must be guided in a rational manner. Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). Beck v. Alabama, 447 U.S. 625 (1980) makes it clear that the facts of a given case may support the finding by a jury that any one of several offenses were committed by a defendant and that a defendant must be given the opportunity to be sentenced for a lesser offense if the facts warrant it.

No defendant charged and tried for capital murder could be prejudiced because the jury could also consider first degree murder as a lesser included offense. The

only possible result to a defendant would be an opportunity for leniency. Where there is no doubt that the evidence supports a conviction for capital murder, and where the statutory guidelines for conviction and sentence meet constitutional muster, a defendant cannot complain that he is convicted of that offense. See Batchelder, 442 U.S. at 123.

In summary, respondent submits that the Arkansas statutory scheme in this regard is constitutional and certiorari in this case should be denied.

II.

NO PERSON OPPOSED TO THE DEATH PENALTY WAS EXCLUDED FOR CAUSE FROM PETITIONER'S JURY PANEL AND HE WAS NOT DENIED HIS RIGHT TO A JURY COMPOSED OF A CROSS SECTION OF THE COMMUNITY.

As mentioned in the opinion of the Arkansas Supreme Court, petitioner argued on appeal and here argues that it was error

to exclude for cause a juror who could not under any circumstances impose the death penalty. An examination of the record reveals that no person on petitioner's jury panel was excused for cause based on their views on capital punishment. Each venireman was either: (1) accepted without objection as a juror; (2) excused for cause on submission by petitioner; (3) excused for cause based on some ground other than their views regarding the death penalty; or (4) excused by peremptory challenge by one of the parties.

Petitioner's jury panel was selected by the random selection process. The random selection process does not guarantee a proportionately accurate cross section of the community to match the demographics of an area. See Swain v. Alabama, 380 U.S. 202 (1965). To establish a violation of the fair cross section requirement of the Sixth

Amendment, a defendant must first make a prima facie showing of the distinctiveness of a group that it is underrepresented on the venire and that its members have been subject to systematic exclusion. See Duren v. Missouri, 439 U.S. 357 (1979) Respondent submits that the petitioner failed to meet any part of this burden of proof. As no juror was excused for cause based on their views of capital punishment, even Witherspoon v. Illinois, 391 U.S. 510 (1968) is not applicable to this case.

Respondent is well aware of the holding in Grigsby v. Mabry, ___ F. Supp. ___ (E.D. Ark. August 5, 1983) which is currently on appeal to the United States Court of Appeals for the Eighth Circuit. Though a cross-section violation was found in that case where jurors were excluded for cause pursuant to Witherspoon, respondent submits that even if upheld on appeal Grigsby

does not apply to the circumstances present in the instant case where no jurors were so excused.

Both the petitioner and the State are entitled to a fair and impartial jury which will consider the full range of penalties. Jurors may properly be questioned as to whether they will consider all the penalties provided by law. Witherspoon v. State, supra; Stephens v. State, 277 Ark. 113, 640 S.W.2d 94 (1982); Haynes v. State, 270 Ark. 685, 606 S.W.2d 563 (1980). In Haynes, the Arkansas Supreme Court held that the prosecuting attorney had exceeded the proper bounds of voir dire by attempting to commit jurors to the maximum penalty prior to the trial of the case. In Stephens, the Arkansas Supreme Court affirmed a case in which the jury panel had been extensively questioned as to whether they would consider the entire range of penalties and

where a venireman was excused for cause upon stating that he would not impose the maximum under any circumstances. Jury selection in Stephens and other non-capital cases is no different from jury selection in a capital case.

This issue is without merit. Respondent submits that petitioner was tried by an impartial jury which represented a fair cross section of the community. The jury first determined petitioner's guilt and following the presentation of additional evidence determined the appropriate sentence pursuant to Ark. Stat. Ann. §41-1301 et seq. (Repl. 1977). Petitioner has failed to establish any constitutional violation in the process of jury selection or trial of his case.

III.

THERE WAS NO VIOLATION OF RULE 404 OF ARKANSAS' UNIFORM RULES OF EVIDENCE, & ANY ALLEGED EVIDENTIARY ERRORS DID NOT ARISE TO A VIOLATION OF DUE PROCESS OF LAW.

Petitioner contends that the alleged failure of the state judicial system to enforce Rule 404, Uniform Rules of Evidence, Ark. Stat. Ann. Vol. 3A (Repl. 1979) deprived him of a fair trial and due process of law. In response to this argument respondent submits that Rule 404 was not violated, and even if it were, any error was harmless beyond a reasonable doubt. Furthermore, any such alleged error did not arise to a violation of due process.

Rule 404 provides that evidence of a person's character is not admissible except in limited circumstances not applicable here. Petitioner complains that this rule was violated by the fact the prosecutor cross

examined petitioner about a former wife, about an alias name, and whether or not he was a reverend.

Respondent submits that evidence of a previous marriage of petitioner is not "character evidence" within the meaning of Rule 404. Nor is the fact petitioner was known as a reverend. Respondent contends that reference to being a reverend was, if anything, to petitioner's benefit. Moreover, there was no objection to this question, so it was not properly preserved for appeal. Wainwright v. Sykes, 433 U.S. 477 (1972); Wicks v. State, 270 Ark. 781, 606 S.W.2d 366 (1980).

Petitioner was also asked on cross examination who "Anthony Santana" was, and after an objection that was overruled, answered that it was an alias name for him used by the police. Respondent contends that evidence of an alias name was not

"character evidence" within the meaning of the rule, and even if it were, it was harmless error beyond a reasonable doubt.

Petitioner had already admitted on direct examination that he was a felon, and therefore the fact the police knew him by an alias name could not have been prejudicial.

On appeal to the Arkansas Supreme Court it was argued that the above questions were irrelevant and prejudicial. The Court held that it could not say from an examination of the record that these questions, standing alone, constituted prejudicial error.

Petitioner alleges, however, that such evidence was prejudicial unless it could be held "harmless beyond a reasonable doubt," implying that the Arkansas Supreme Court did not use that standard. Respondent submits that such is the standard used by the Court even though the language used

varies occasionally. See Pace v. State, 265 Ark. 712, 580 S.W.2d 689 (1979). Respondent also notes that harmless error has been found on other death penalty cases. Ford v. State, 276 Ark. 98, 633 S.W.2d 3 (1982), cert. denied, 103 S.Ct. 389, 74 L.Ed.2d 519 (1982).

Moreover, it is well settled that the admissibility of evidence is usually a matter of state law and procedure and does not involve federal constitutional issues. Davis v. Campbell, 608 F.2d 317 (8th Cir. 1979); Schliecher v. Wyrick, 529 F.2d 906 (8th Cir. 1976). It is not the function of the federal court to be an appellate arm of the State, but rather to make inquiry into whether the constitutional rights of the petitioner were safeguarded at his state criminal trial. Walker v. Bishop, 295 F.Supp. 767 (E.D. Ark. 1967); aff'd 408 F.2d 1378 (8th Cir. 1969). A justifiable

federal issue is presented only where trial errors infringe upon a specific constitutional protection or are so prejudicial as to amount to a denial of due process. Davis v. Campbell, supra, citing Cooper v. Campbell, 597 F.2d 628 (8th Cir. 1979).

The evidentiary issue which petitioner raises in this case, even if error, is not so prejudicial so as to amount to a denial of due process and thereby does not require reversal by a federal court. A case on point is Hackworth v. Beto, 434 F.2d 852 (5th Cir. 1970) in which petitioner alleged that the State improperly introduced character testimony against him. The court agreed, but held that these apparent errors in the trial were not so serious so as to constitute a violation of due process of law, stating that "the proceedings were, on the whole, fundamentally fair." Hackworth v. Beto, supra, at 854.

Here also, the proceedings were fundamentally fair. The Arkansas Supreme Court specifically reviewed the sufficiency of the evidence and concluded that it was sufficient upon which to base the conviction. The Court reviewed all objections decided adversely to petitioner and concluded there was no error, and further stated there was no evidence that the jury's verdict was based on passion or prejudice, or that the imposition of the death penalty was arbitrary or capricious.

In summary, respondent submits that no violation of Rule 404 occurred, and the alleged errors, if any, were harmless beyond a reasonable doubt. Clearly, the proceedings were fundamentally fair, and petitioner's alleged errors do not arise to a violation of due process. For these reasons certiorari should be denied by this Court.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefor. This case contains no issues worthy of such review. Respondent respectfully submits that the Arkansas Supreme Court has followed the applicable decisions of this Court and has properly denied petitioner relief in his direct appeal. Therefore, for these reasons, and for the reasons and authorities cited in respondent's brief in opposition to the petition for writ of certiorari, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

JOHN STEVEN CLARK
Attorney General

By: LESLIE M. POWELL
MARCI TALBOT
Assistant Attorneys General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

ATTORNEYS FOR
RESPONDENT

CERTIFICATE OF SERVICE

We, Leslie M. Powell and Marci Talbot, Assistant Attorneys General, do hereby certify that two copies of Brief for Respondent in Opposition to Petition have been served on petitioner herein by mailing a copy of same, postage prepaid, to Mr. Thomas M. Carpenter, 807 W. Third St., Little Rock, Arkansas, 72201, this 11th day of November, 1983.

Leslie M. Powell
LESLIE M. POWELL

Marci Talbot
MARCI TALBOT
Assistant Attorneys General

APPENDIX

STATE OF ARKANSAS

vs. CR 81-46

WILBURN A. HENDERSON

SEBASTIAN CIRCUIT COURT

TRANSCRIPT

MR. FIELD CONTINUES:

Q. Who is The Reverend W. A. Henderson?

A. Myself.

Q. Okay, are you a reverend?

A. Yes, I am.

Q. And who is Anthony Santana?

A. At one time---

MR. SETTLE: Your Honor, I object to this. I don't know what the relevance is and would like to approach the bench. MR. FIELDS: Your Honor, we could tell him. MR. SETTLE: Your Honor, can we approach the bench? I'd like to know the relevance. (The following discussion is at side bar, outside the hearing of the jury):

MR. SETTLE: What does Mr. Fields think he's trying to do? I mean this isn't cross examination. He's making a circus out of this thing.

THE COURT: Who is this last fellow?

MR. FIELDS: It's him.

MR. SETTLE: No, it isn't.

MR. FIELDS: It's a name he has gone by. He said under oath that his name was W. A. Henderson. He's going to say that. If he doesn't we can prove it.

MR. SETTLE: That I'd like to see. How can you prove it?

MR. FIELDS: It's a name he had gone under. If he says "No," we can prove it. We've got the documents.

THE COURT: I think he'd be entitled to ask it.

MR. FIELDS: Thank you.

MR. SETTLE: Note my exception.

(Discussion at side bar is concluded)

MR. FIELDS CONTINUES:

Q. Who is Anthony Santana?

A. I believe it's an alias the Police Department put on me one time.

Q. It's a name you went by?

A. Not that I know of.

Q. You've never heard the name before?

A. I've heard it before.

Q. You've never used that name?

A. Not that I know of. . . . (T.
1512-1513)